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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-225

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
Defendant Appellants,
AND
ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor Appellants,

versus

UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
ARGUMENT	1
I. THE APPELLEES' REQUESTED CHECKLIST APPROACH VIOLATES BOTH CONSTITUTIONAL LIMITATIONS AND PRUDENTIAL CONSIDERATIONS	1
II. THE DISTRICT COURT SHOULD HAVE ABSTAINED	10
III. ON THE RECORD IN THIS CASE THE ELECTION PROCEDURES OF THE AERA CANNOT BE HELD UNCONSTITUTIONAL	11
IV. ON THIS RECORD, THE PROHIBITION AGAINST UNTRUTHFUL PUBLICITY CANNOT BE HELD UNCONSTITUTIONAL ON ITS FACE	13
V. THE APPELLEES APPEAR TO HAVE CONCEDED ERROR CONCERNING THE DISTRICT COURT'S SEVENTH AMENDMENT AND SUBSTANTIVE DUE PROCESS HOLDINGS: THEIR ALTERNATIVE GROUND FOR ASSERTING UNCONSITUTIONALITY OF SECTION 23-1393 (B) CANNOT AND SHOULD NOT BE CONSIDERED BY THIS COURT ON THIS RECORD	16

TABLE OF CONTENTS (Continued)

	Page
VI. ON THIS RECORD, THE DISTRICT COURT'S HOLDING CONCERNING ACCESS TO FACILITIES CANNOT BE SUSTAINED	17
VII. THE APPELLEES' ERROR ON THE SEVERABILITY ISSUE PRECLUDES THEIR ATTEMPT TO EXPAND THE ISSUES IN THIS CASE	19
CONCLUSION	22
APPENDIX	
A. Rule 65 of the Federal Rules of Civil Procedure	A-1

TABLE OF AUTHORITIES CITED

Cases	*Page*
A.F.L. v. Swing, 312 U.S. 321 (1941)	15
A.F.L. v. Watson, 327 U.S. 582 (1946)	4, 5, 22
Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945)	4, 5, 22
Blanchette v. Connecticut General Insurance Corp., 419 U.S. 102 (1974)	5
Brandenburg v. Ohio, 395 U.S. 444 (1969)	9
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	7, 8, 9
California Bankers Association v. Shultz, 416 U.S. 21 (1974)	5
Carter v. Carter Coal Co., 298 U.S. 238 (1936)	21
Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932)	20, 21
Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961)	6, 22
Hudgens v. NLRB, 424 U.S. 507 (1976)	18
NLRB v. Babcock and Wilcox Co., 351 U.S. 105 (1956)	2, 18
NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58 (1964) *(Tree Fruits)*	14
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) *(Times Libel)*	14
Railroad Commission v. Pullman Co., 312 U.S. 496 (1941)	11
Sloan v. Lemon, 413 U.S. 825 (1973)	21
Street v. New York, 394 U.S. 576 (1969)	9
Tilton v. Richardson, 403 U.S. 672 (1971)	20, 21

TABLE OF AUTHORITIES CITED

Cases (Continued)

	Page
United Public Workers v. Mitchell, 330 U.S. 75 (1947)	6, 22
United States v. Jackson, 390 U.S. 570 (1968)	20
Warth v. Seldin, 422 U.S. 490 (1975)	7
Yates v. United States, 354 U.S. 298 (1957)	9

Constitutional and Statutory Provisions

	Page
UNITED STATES CONSTITUTION	
Article III	1
Seventh Amendment	2, 16
National Labor Relations Act	
§ 8(b)(4)(ii) (B)	13
Federal Rules of Civil Procedure,	
Rule 65	17
Arizona Revised Statutes	
§ 23-1385	13, 14, 15
§ 23-1392	7
Arizona Rules of Civil Procedure	
Rule 65	16, 17

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APPELLANTS' REPLY BRIEF

I.

THE APPELLEES' REQUESTED CHECKLIST APPROACH VIOLATES BOTH CONSTITUTIONAL LIMITATIONS AND PRUDENTIAL CONSIDERATIONS

The appellants' opening brief discusses the reasons why a checklist review of an entire, comprehensive regulatory statute violates Article III's case or controversy requirement.

The appellees' brief effectively demonstrates the impracticability of such an approach. It contains ten questions presented. Five of the ten are issues that were neither considered by the district court, nor presented by the Jurisdictional Statement or the Motion to Affirm. Thus, the appellees request not only that the district court's checklist approach be continued in this Court, but also that the list be expanded.

Even the ten questions presented are not exhaustive. The 146 pages of the appellees' brief suggest literally dozens of legal questions as subissues of the questions presented. Many of them are important questions, including questions of interpretation of Arizona statutes, questions of fact, questions of policy, and questions of federal constitutional law. If nothing else, their sheer magnitude illustrates the practical wisdom of the case or controversy requirement that legal issues—especially constitutional issues—be decided as they are presented by actual application of the challenged provisions. Issues concerning labor election procedures ought to be decided in labor election cases, sharpened by the facts of those cases. Any challenge to the prohibition against the false secondary consumer publicity provision should arise out of a case involving consumer publicity. If the Seventh Amendment is to be held binding on the states because AERA arbitration is not a constitutionally adequate substitute for jury trial litigation, the decision should be made in a case involving application of the statute's arbitration provisions. And if for the first time in history constitutional rigidity is to be imparted into the *Babcock and Wilcox*

standards, it should be in an actual case where there is evidence concerning the *Babcock and Wilcox* factual criteria.

The appellants' opening brief contains the following statement:

> We know of no case—and in the six years of this litigation the appellees have discovered none—in which this Court has approved the wholesale consideration of the constitutionality of a comprehensive regulatory statute, each of whose challenged provisions raises separate constitutional issues, in advance of, and in the absence of, the application of those provisions. The approach to that kind of statute has always been to consider the individual provisions as each is involved in concrete factual settings raising the constitutional issues of which the plaintiffs complain.[1]

The appellees' brief does not discuss any case that even purports to fit the foregoing description, which is also a description of the instant case. The appellees complain that "[a]bstention would force the Union to bring a declaratory judgment action in state court or to engage in constitutionally protected action and wait for the AERB or private parties to seek enforcement against it, one or several sections of the Act at a time."[2] This is a reasonably accurate description of how the various provisions of important, comprehensive, regulatory statutes have come before this Court for consideration of constitutional issues. And no one disputes that this regulatory statute is important, and comprehensive. Of course it takes longer. Of course the

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[1] Appellants' Brief, 22-23.

[2] Appellees' Brief, 58.

opponents would prefer a massive, checklist review. Beyond any doubt, the opponents of the Wagner Act, or Taft-Hartley, or Landrum-Griffin, or the Smith Act, or the Subversive Activities Control Act, or the Social Security Act would have preferred to lay the entire package before this Court and obtain a ruling on the validity of every single objectionable provision. Instead, the federal courts have dealt with those statutes "one or several sections ... at a time" as the provisions of that section or sections were applied to particular plaintiffs. They have done so with the benefit of a record that showed in that case how that provision affected the interests of the particular individual. During the interim, actual experience with the sections at issue—including administrative and judicial enforcement and interpretation—has served to enlighten the judicial decision once the issues reached the courts.

Twice in its history, this Court has considered constitutional challenges to an entire comprehensive state labor statute apart from any enforcement of its individual provisions. *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450 (1945) and *A.F.L. v. Watson,* 327 U.S. 582 (1946). In neither of those cases did the breadth of issues approach those which the appellees have asked the Court to decide.

In both *McAdory* and *Watson,* this Court declined to decide in the abstract. In *McAdory* the Court held that the case was not ripe, and in *Watson,* the Court abstained. The principal distinction between the AERA and the statutes in *McAdory* and *Watson* is that the provisions contained in the AERA cover a far broader range of legislative policy decisions. The case

or controversy issue in this case therefore falls squarely within the judgment dismissing the writ of certiorari in *McAdory:* "[w]e would not have granted certiorari to review so unsubstantial a question ..." 325 U.S. at 472.

In their Motion to Affirm, the appellees advanced one set of criteria for distinguishing *McAdory* and *Watson.*[3] Those criteria were dealt with in the appellants' opening brief,[4] and were not repeated in the appellees' merits brief. In a footnote, the appellees now suggest other distinctions.[5] *McAdory* and *Watson* have not been distinguished, and they cannot be. For reasons developed in our opening brief, the defect in those cases is identical to the defect here: both involved attempts at checklist review of comprehensive labor statutes apart from actual application of the provisions challenged. To our knowledge, these are the only two cases involving attacks on state labor statutes apart from enforcement of their individual provisions. The principle, however, extends beyond the state labor statute context. We know of no Supreme Court precedent for the district court's wholesale consideration of the constitutionality of a comprehensive regulatory statute in advance of, and in the absence of, the application of the individual statutory provisions. See *Blanchette v. Connecticut General Insurance Corp.,* 419 U.S. 102 (1974); *California Bankers Association v.*

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[3] Motion to Affirm, 37-38.

[4] Appellants' Brief, 25-27.

[5] Appellees' Brief, 43-44, footnote 106.

Shultz, 416 U.S. 21 (1974); *Communist Party v. Subversive Activities Control Board,* 367 U.S. 1 (1961); *United Public Workers v. Mitchell,* 330 U.S. 75 (1947).

The appellees' brief is replete with conclusionary generalities to the effect that the statute has been enforced. In addition, three cases outside the record are appended to the brief. All of these assertions notwithstanding, three controlling realities have not been challenged:

1. Not one single provision of the act held unconstitutional by the district court has ever been applied to any plaintiff in this lawsuit.

2. The only provision held unconstitutional by the district court that has been applied to anyone is section 1389, dealing with elections. In no election that has been held, does the record reflect any assertion of unfairness because of delays.

3. This case does not arise out of the application of any statutory provision to any person. The plaintiffs complain of instances in which temporary restraining orders were entered against them. They also complain that state court orders have been entered prohibiting pressures on secondary employers. This case did not arise out of any of those enforcement actions. Those actions occurred in other cases, all of which are now final and not appealable. Even if they were not final and nonappealable, the proper context in which to raise any constitutional questions is the particular case or controversy in which the questions arose.

The appellees also assert that the Act has caused decline in union membership, failure of agricultural wages and benefits in Arizona to keep pace with other states, and a general decline in union support. These conclusionary statements purport to be based on testimony by Mr. Chavez at pages 399 through 400 of the Appendix of Record. We invite the Court's examination of that testimony. It consists of highly speculative generalizations, with no supporting specifics. There are no data, no numbers, not even any examples. Moreover, even if these self-serving generalizations were sufficient to establish concrete harm, the causal connection would still not exist. *Warth v. Seldin,* 422 U.S. 490 (1975). That is, assuming *arguendo,* the existence of such harm, it was not caused by the provisions invalidated by the district court, because none of those provisions has ever been applied to any of the plaintiffs in this law suit.

Much of the appellees' argument depends on the existence of the criminal provision, section 1392. For reasons discussed at page 37 in our opening brief, we disagree that section 1392 can breathe case or controversy status into this case. That issue need not be reached, however. Even the District Court agreed that this section is severable.

The appellees' attempt to fit this case within the overbreadth doctrine cannot succeed. As this Court clarified in *Broadrick v. Oklahoma,* 413 U.S. 601 (1973), the overbreadth doctrine, applicable in First Amendment cases, is an exception to the principle "[e]mbedded in the traditional rules governing constitutional adjudication ... that a person to whom a statute may constitutionally be applied will not be

heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others . . . ." 413 U.S. at 610. The exception is "a limited one at the outset [and] attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct. . . ." *Id.* at 615. Within its limited sphere, the overbreadth doctrine has both an absolute, and a comparative dimension. That is, the range of potential sweep in the constitutionally protected activity must be not only real, "but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U.S. at 615.

Judged by these standards, the overbreadth challenge in *Broadrick* to Oklahoma's little Hatch Act was rejected. The overbreadth challenge in this case rests on even more tenuous grounds for the following reasons:

1. The Court's opinion in *Broadrick* carefully spells out the relationship between overbreadth doctrine and principles dealing with third party standing. 413 U.S. at 610-611. Standing is one component of the case or controversy requirement. In *Broadrick*, the Court had before it a comparatively precise challenge: the appellants asserted that in addition to concededly prohibitable activity, the statute prohibited the wearing of lapel buttons or the display of bumper stickers. In the instant case, the appellees are asking that the overbreadth doctrine be applied not just to one section, but to an entire statute. The various sections of the AERA are related in the sense that all comprise part of a comprehensive labor law, but the component sections contain separate policy judgments, so that the Court is being asked to review in the abstract not just

one legislative policy judgment, but many. Relative to the linkage between overbreadth and standing, the Court in *Broadrick* observed that," "[t]hese principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." 413 U.S. at 610-611. The difference between *Broadrick* and the instant case in this respect is that both quantitatively and qualitatively the appellees here seek to extend the territory of the roving commission far beyond what the appellants were asking in *Broadrick*.

2. It is very clear from *Broadrick* that the applicability of the overbreadth doctrine depends on the mix of speech and conduct in the particular case.[6] The activities covered by the AERA will necessarily involve a mix of speech and conduct. What this case-to-case, section-to-section mix will be cannot be determined in advance nor in the abstract.

3. This Court stated in *Broadrick:* "Application of the overbreadth doctrine ... is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been *or could be* placed on the challenged statute." 413 U.S. at 613 (emphasis added)

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[6] 413 U.S. at 615. This of course is consistent with the Court's decisions generally in the First Amendment area. See, e.g. *Yates v. United States*, 354 U.S. 298 (1957); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Street v. New York*, 394 U.S. 576 (1969).

II.

THE DISTRICT COURT SHOULD HAVE ABSTAINED

The abstention issue in this case is this simple: there are numerous instances, spelled out in our opening brief, in which the constitutional issue would be raised if the statute were interpreted one way, and avoided if interpreted the other way. This is the pristine circumstance calling for federal judicial abstention.

Particularly astounding in this respect is the appellees' assertion concerning the district court's holding that Arizona's Administrative Procedure Act time limits are applicable to AERA elections: "The district court based this *factual finding* [that the APA time limits are applicable] solidly on expert testimony, testimony that would merely be repeated in a state court were this Court to abstain."[7] The meaning of an Arizona statute does not involve an issue of fact to be resolved by findings. It is an issue of law. The Arizona courts do not resolve issues of law by taking and relying on expert testimony.

It is abundantly clear that there is a serious disagreement among the brief writers in this case concerning the interpretations of the statute. It should be equally clear that the disagreement is genuine, and

[7] Appellees' Brief, 55, (emphasis added).

in most instances, material.[8] In the appellants' view, these differences are not only reasonable; the interpretations that avoid the constitutional issues are the more persuasive.

More than a dozen pages of briefs before this Court have been devoted exclusively to the meaning of Arizona law. If these were not serious issues, they would not have been so treated by our opponents. The United States Supreme Court is not the proper place to resolve these issues of Arizona law.

At one point[9] the appellees suggest that the *Pullman* abstention doctrine should be abandoned altogether. We disagree with that position. It is, however, the only basis on which the appellees could succeed on this issue.

III.

ON THE RECORD IN THIS CASE THE ELECTION PROCEDURES OF THE AERA CANNOT BE HELD UNCONSTITUTIONAL.

We disagree with the appellees' creative hypotheses as to how employees might be excluded from participating in elections. More specifically, we reject the implication that appellees attempt to convey that in

[8] The amici take the position that one such instance, i.e., the authority of the Arizona Board to issue bargaining orders, may not be material, because "the district court's finding [sic] on this point was not a part of its constitutional decision." (Amici Brief, 52). From the district court's opinion, it is not possible to ascertain whether this assertion is correct. In any event, the balance of the district court's interpretations of state law clearly are material.

[9] Appellees' Brief, 60, n. 126.

the Cactus Ranch-Teamsters election the election procedures were utilized by the employer to secure improper objectives. There is absolutely nothing in the record to support that implication.

Hypotheses and speculations aside, the constitutionality of the AERA's election procedures, correctly described by the district court and the appellees as virtually identical to those of the NLRA, stands on unassailed foundations. The case has not been made that an election procedure virtually identical to the NLRA could ever amount to a violation of freedom of association. This would not only call into question the existing national act. It would also raise serious doubt whether the coverage of that act as presently administered could constitutionally be extended to agricultural labor.

The only constitutional argument that has ever been made against the election procedures embodied in this statute is that in the case of certain crops, it may not be possible to hold the election during the period of peak employment. The short answer to this criticism is that Arizona's election procedures cannot possibly be unconstitutional because whatever the optimum solution, Arizona law is sufficiently flexible to adopt it. In some cases, the optimum solution may be to follow the NLRB model and hold the election during the next employment peak. The appellees do not deny that Arizona law permits this option. In other cases, the optimum solution may be to follow the California model, hold an immediate election, and defer all issues

except representation until after the election. The appellees do not deny that Arizona law permits this option.

For reasons developed in our opening brief, the position that the Constitution requires Arizona to follow either the California model or the national model is theoretically unsound. Equally unsound is the position that the Constitution precludes either model. Even as a matter of abstract theoretical logic, however, it is impossible to assail as unconstitutional an election system that permits either option, according to the needs and circumstances of the particular case.

IV.

ON THIS RECORD, THE PROHIBITION AGAINST UNTRUTHFUL PUBLICITY CANNOT BE HELD UNCONSTITUTIONAL ON ITS FACE

The appellant's opening brief discusses three separate reasons why the district court's holding that Section 1385(B) (8) is unconstitutional on its face cannot be sustained.[10] Those reasons have not been effectively refuted, and need not be repeated. Nevertheless, several brief comments are in order concerning assertions made by the appellees and the amici.

The similarity between the AERA's prohibition against untruthful publicity and its counterpart in § 8(b)(4) (ii)(B) of the NLRA has not been adequately explained, and is controlling. The appellees point out that one is a prohibitory section and the other a

[10] Appellants' Brief, 60-64.

guarantee,[11] but there is no suggestion as to why the difference between permitting the truthful and prohibiting the untruthful is of constitutional significance.

The amici point to "this Court's well-established principle of construing the NLRA to prohibit peaceful, speech-related activity for particular ends only when 'there is the clearest indication in the legislative history that Congress intended to do so.' " [Quoting from *Tree Fruits*, 377 U.S. at 62.][12] The amici have correctly stated "this Court's well-established principle." Appellants agree that their statement of principle describes exactly what happened in the *Tree Fruits* case. Fundamental considerations of judicial comity, respect between governments in a federal system, and the rule of necessity all require that a no lesser privilege be afforded the courts of the State of Arizona concerning the reach of that State's statute, and particularly concerning whether Section 1385 (B) (8) would permit a *Times Libel* defense.

The appellees engage in speculation concerning the reach of the statute, and conclude that it "restricts expressions of opinion like 'Unfair to Labor'."[13] That kind of speculation is necessary to the appellees' case, but it is not an adequate basis for constitutional adjudication. We staunchly disagree with the appellees' speculations concerning the meaning of subsection 8, but the right to construe Arizona law is not vested in the appellants or the appellees.

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[11] Appellees' Brief, 77, footnote 157.

[12] Amici Brief, 72, footnote 37.

[13] Appellants' Brief, p. 75.

Finally, it is incorrect to suggest that the appellants have abandoned the position that the district court erred in extending the holding in *AFL v. Swing*, 312 U.S. 321 (1941) to embrace not only primary picketing, but also secondary boycotts. The appellants' attack on that ruling is "fairly comprised"[14] within the appellants' statement of questions presented. The fourth question presented in the Jurisdictional Statement is:

> Whether a state labor statute's extension of the proviso in § 8(b)(4)(ii)(B) of the NLRA, permitting truthful secondary consumer pressures, to a prohibition against untruthful, dishonest and deceptive secondary consumer pressures renders it unconstitutional.

This fourth question is clearly a defense of the constitutionality of section 1385 (B) (8). Examination of that section reveals that it consists of three sentences. The first states the prohibition against consumer pressures by the use of dishonest, untruthful and deceptive publicity. Both the second and third sentences define what is permissible inducement within the meaning of the first sentence. The district court's extension of *Swing* to include secondary as well as primary pressures is fairly comprised, therefore, within the appellants' defense of the prohibition against dishonest, untruthful and deceptive publicity. On the merits of this issue, *Swing* is different from this case in two respects. First, *Swing* involved a prior restraint. Second, *Swing* invalidated a state law that in effect prohibited all primary picketing in the absence of a primary dispute. Section 1385 (B) (8), by contrast,

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[14] Rule 15 (c), Rules of the Supreme Court of the United States.

deals with secondary boycott attempts to subject employers with whom the union has no quarrel to the adverse effects of the boycott. This is, therefore, simply another example of an attempt—common to many labor laws, federal and state—to control secondary boycotts.

V.

THE APPELLEES APPEAR TO HAVE CONCEDED ERROR CONCERNING THE DISTRICT COURT'S SEVENTH AMENDMENT AND SUBSTANTIVE DUE PROCESS HOLDINGS: THEIR ALTERNATIVE GROUND FOR ASSERTING UNCONSTITUTIONALITY OF SECTION 23-1393 (B) CANNOT AND SHOULD NOT BE CONSIDERED BY THIS COURT ON THIS RECORD.

The Motion to Affirm devoted an entire numbered section to the defense of the district court's holding invalidating "compulsory arbitration without court review." (Motion to Affirm, 26) The discussion of the substantive due process and Seventh Amendment issues in the appellees' merits brief consists of two footnote sentences:

> The three-judge court below on its own motion found the binding arbitration provision of §1393(B) violative of substantive due process and the Seventh Amendment. The statute's facial invalidity on First Amendment grounds obviates these other concerns. Appellees' Brief, 71, n. 153.

The "First Amendment grounds" involve a challenge to the temporary restraining order provisions of Arizona's Rule 65. The appellees have appended Arizona's Rule 65 to their brief, in recognition of the fact that

temporary restraining orders under the AERA are governed by that rule. Rule 65 of the Federal Rules of Civil Procedure is appended to this brief. We invite the Court to compare the temporary restraining order provisions of Arizona's rule (65(e)) with their counterpart (really their parent) in the federal rules, Rule 65(b). There is no difference of any consequence.

Even if this Court may at some time want to consider whether the temporary restraining order provisions of Rule 65 raise constitutional issues, it should certainly not be done in a case that does not arise out of the application of Rule 65 to the parties before the Court. With the benefit of neither a lower court opinion nor a supporting record, this is not the appropriate case in which to take on the issue of the constitutionality of Rule 65 of the Federal Rules of Civil Procedure.

VI.

ON THIS RECORD, THE DISTRICT COURT'S HOLDING CONCERNING ACCESS TO FACILITIES CANNOT BE SUSTAINED

The appellees rely on a number of cases involving communications in the labor context. Reliance on those cases is necessarily misplaced, because each of them arose out of specific facts, involving specific attempts to communicate. Here, there are no specific facts. This case does not deal with any particular employer, any particular employees, any particular labor camp, or any particular attempt to communicate. The

district court's judgment represents a blanket invalidation applicable to all employers (whether or not they maintain labor camps), all employees, all labor camps.

The appellees have not taken issue with the appellants' argument that the district court's holding regarding access to facilities is based on three erroneous assumptions. As to the substance of those assumptions, the appellees discuss only the first, whether facilities mean premises. There is absolutely no argument that the *Babcock and Wilcox* standards are constitutionally required. The necessary conclusion that the appellees recognize, as they must, is that "the rights and liabilities of the parties [in a union access case] are dependent exclusively on the National Labor Relations Act." *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976).

Concerning the third assumption, the Motion to Affirm conceded that "[s]ince the existence of adequate alternative means of communication will vary from case to case, that determination must be left for the appropriate Board or court to determine in each instance." Motion to Affirm, 25. Following that concession, however, and the appellants' discussion of it in the merits brief (appellants' brief, 72) no further mention is made of this issue. It cannot be ignored. Even assuming that facilities means premises, and even assuming that the *Babcock and Wilcox* standards were of constitutional dimension, those standards turn on factual inquiries that will necessarily vary from case to case: whether there are other available channels of

communication and whether there has been discrimination against the union by allowing other distribution.[15]

VII.

THE APPELLEES' ERROR ON THE SEVERABILITY ISSUE PRECLUDES THEIR ATTEMPT TO EXPAND THE ISSUES IN THIS CASE.

The appellees seek not only to have this Court approve the district court's constitutional adjudication in the abstract; they also seek rulings on issues that the district court did not reach. The appellees' reliance on the principle that the prevailing party may rely on any ground that supports its judgment is misplaced. The appellees are not raising additional grounds in support of their judgment, but are seeking to enlarge the judgment itself. The new issues can be considered as additional grounds in support of the judgment only if the Court accepts their view concerning severability.

The linkage between the appellees' enlarged checklist and the severability issues is as follows. The judgment in this case is that the entire Agricultural Employment Relations Act is invalid, every section, every paragraph, every line. The supporting grounds for that judgment are the invalidity of five specific provisions, and the necessarily implicit conclusion that "it is evident that the legislature would not have enacted [the balance of the statute] independently of

[15] The statement of the amici (Amici Brief, 48) that the vast majority of farm workers reside in labor camps is not correct. The sole reference cited by Amici as a basis for the statement is not to the record but to a statement in the opinion below. The fact is the record contains absolutely no support for the assertion.

[those five provisions]." *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932). If that conclusion is correct, then an argument can be made that the appellees' additional issues constitute additional support for the judgment that the entire statute is invalid. Otherwise, they are simply attempts to enlarge the judgment.

The appellees' position concerning severability is clearly erroneous. From the motion to affirm to the merits brief, the severability argument has been downgraded so that in the appellees' view it no longer constitutes one of the questions presented. There is absolutely no reply to the discussion contained in pages 73 through 77 of the appellants' brief concerning the functional independence of the provisions of the Act. Also lacking is any treatment, or even mention, of *Champlin Refining Co. v. Corporation Commission*, 287 U.S. 210 (1932), notwithstanding the fact that the statement contained in that case and quoted in our opening brief is the most frequently cited and most authoritative general statement of the severability principle. Neither is there any mention or citation of *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) and *United States v. Jackson*, 390 U.S. 570, 585 (1968) which, for reasons developed in our opening brief, reflect the Court's current rules concerning the significance of the presence or absence of a severability clause, and the integration of the severability doctrine into the larger principle that statutes are to be interpreted so as to save rather than destroy.

The appellees' brief discussion of severability relies on two cases, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) and *Sloan v. Lemon*, 413 U.S. 825 (1973). It is doubtful that *Carter v. Carter Coal Co.* ever stood for the proposition that the absence of a severability clause gives rise to a presumption. That clearly is not the law today, as declared in as plain language as possible by *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) and *United States v. Jackson*, 390 U.S. 570, 585 (1968), discussed in appellants' opening brief. The single sentence quoted from *Sloan v. Lemon*, 413 U.S. 825 (1973) deals with an entirely different situation. Indeed, the *Sloan* opinion cites those portions of *Tilton* and *Champlin* cited in appellants' opening brief. The controlling reality — undisputed and undisputable — is that "the ultimate determination of severability will rarely turn on the presence or absence of [a severability] clause"[16] and the cases from *Champlin* through *Tilton* demonstrate that the Court has integrated severability rules into the larger principle that "the cardinal principle of statutory construction is to save and not to destroy." *Tilton v. Richardson*, 403 U.S. at 684.

We agree with the amici that "the decision on the constitutionality of the compulsory arbitration provision was wholly separate from the court's holdings on the AERA election procedures, the AERA access provision and the unfair labor practice provision prohibiting certain publicity directed at the ultimate consumer of agricultural products."[17] The obvious reason that the decision on the constitutionality of

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[16] *United States v. Jackson*, 390 U.S. 570, 585, n. 27 (1968).

[17] Amici Brief, 56, footnote 32.

each of these provisions is separate, and should be considered separately is that the provisions themselves are functionally separate. They raise separate constitutional issues, and represent separate policy decisions.

For reasons developed in appellants' opening brief, it is clear that the various sections of the AERA fit squarely within the frequently cited *Champlin* principle:

> Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law. 286 U.S. at 234.

CONCLUSION

The decisions of this Court can be searched in vain for a precedent supporting the district court's holding. Moreover, even in the cases in which this Court has rejected blanket inquiries into comprehensive statutes, there is no parallel for the breadth of the attack by these plaintiffs. Cases such as *McAdory*, *Watson*, *Mitchell*, and *Communist Party v. Subversive Activities Control Board* called into question identified provisions of the acts at issue. Here the district court held the entire Act unconstitutional—every employer unfair labor practice, every employee unfair labor practice, election procedures, board composition and authority, and rights of employees vis-a-vis their union and their employer—everything from the first sentence to the last. It was a feat comparable to reviewing in their entirety the Taft-Hartley Act or the Social Security Act.

The district court has usurped the function of the Arizona Legislature, by substituting its views concerning what constitutes good policy for those of the Legislature. It has also usurped the function of the Arizona courts by reaching not only the statute's constitutionality but also its meaning. In every single instance where there was a choice, the district court opted for the interpretation that raised, rather than avoided, the constitutional issues.

In obvious recognition of the inadequacy of the lower court's rulings, the appellees at the merits brief stage attempt to add five more questions presented. Substantively, the appellees' positions on those issues lack merit, but the merits of those issues are not before the Court. The jurisdiction of federal courts is limited to cases or controversies. The Council of Revision as part of our governmental scheme was rejected 190 years ago.

The Court should reverse the judgment of the district court.

Respectfully submitted,

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APPENDIX A

Rule 65.

INJUNCTIONS

(a) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice

shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No

such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond of undertaking under this rule.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(c) Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.